No. 16528.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM LAIRD MCGOWAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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TABLE OF AUTHORITIES CITED

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Statement of Jurisdiction.

This is an appeal from a judgment of the United States District Court for the Southern District of California, the Honorable Ben Harrison presiding, adjudging appellant guilty of violating 21 U. S. C., Section 174. This judgment entered on July 7, 1958 [C. 21-22][1] committed appellant to the custody of the Attorney General for concurrent sentences of five years each on Counts One and Two of the indictment [C. 1-2]. Jurisdiction of the District Court was founded upon 18 U. S. C., Section 3231.

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[1]The abbreviation "C." hereafter refers to the "Clerk's Transcript of Record."

Jurisdiction of this Honorable Court to hear this cause may be found in Sections 1291 and 1294(1) of Title 28, U. S. C., and Rules 37 and 39 of the Federal Rules of Criminal Procedure.

Statement of the Case.

Count One of the indictment charged appellant with unlawful receipt, concealment, and transportation of narcotics, whereas Count Two of the indictment charged appellant with unlawful sale of narcotics. At the trial the allegations of the indictment were established primarily by the government's witness, Richard L. Munson, the individual to whom appellant sold the narcotics in question. After the direct examination [R. 7-25] of Munson, appellant subjected the witness to a lengthy cross-examination [R. 25-63].[2] At the end of the government's case in chief there was no motion for judgment of acquittal [R. 83]; instead, appellant took the stand [R. 85-111]. Appellant's evidence controverted Munson's testimony that a sale of heroin did in fact take place. Appellant testified that he had discussed selling heroin to Munson [R. 91, lines 5-7], but solely for the purpose of taking any money Munson might give him [*e.g.,* R. 93, lines 1 and 2; 105, line 5]. The jury subsequently resolved any issue of credibility between the two adversely to appellant [R. 151].

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[2]The abbreviation "R." hereafter refers to the "Reporter's Transcript."

ARGUMENT.

I.

The Trial Court Did Not Err in Limiting the Cross-Examination of the Government's Witness.

A. The Trial Court Did Not Abuse Its Discretion.

One of the principles of *Alford v. United States,* 282 U. S. 687 (1930), the case upon which appellant principally relies, is that "the extent of cross-examination with respect to an appropriate subject of inquiry within the sound discretion of the trial court. It may exercise a reasonable judgment in determinng when the subject is exhausted" at page 694. In the instant case, appellee submits that the subject of the witness Munson's remote arrest for possession of marihuana was exhausted and that the trial court exercised a sound discretion in precluding further inquiry of the matter. Appellant established on cross-examination that Munson had been arrested for possession of marihuana on October 14, 1954 [R. 30, lines 8-10]. However, Munson and appellant did not have discussions about heroin until the latter part of 1956 [R. 8, lines 23-25; R. 9]; moreover, the offense for which appellant was indicted did not occur until November 15, 1957 [C. 1-2]. Now, it is true, though extremely unlikely, that Munson's arrest for possession of marihuana on October 14, 1954, may have, as appellant suggests, biased and prejudiced him against appellant. It is possible, although improbable, that this arrest of three years prior to the incriminating event of November 15, 1957, may have motivated and influenced Munson out of fear of police

reprisal to testify more favorably to the prosecution than the facts warranted. However, appellant was given extremely wide latitude in pursuing this unlikely and collateral tack in his examination of the witness Munson *before* the ruling complained of occurred [R. 29, lines 14-25; R. 30; R. 31, lines 1-6]:

"And what was your reason for going to work with the Government? A. My reason?

Q. Yes. A. Call it civic duty.

Q. You were following a civic duty? A. I don't like heroin or anything that it stands for or anyone who uses it.

Q. Do you like marijuana? A. No.

Q. Have you ever had any possession of marijuana? A. No.

The Court: I do not think that is proper.

Mr. Bradley: In view of his statement that he doesn't like heroin I thought certainly I ought to know if he is interested in marijuana.

The Court: We are only interested in heroin in this case.

By Mr. Bradley:

Q. As a matter of fact, Mr. Munson, were you arrested and in possession of marijuana, isn't that right? A. October 14, 1954.

Q. And as a result of this arrest that is why you went to work for the Government, isn't that true? A. That is not true, and I was arrested for suspicion of possession.

Q. There was marijuana there, wasn't there? A. Yes.

Q. That was in your home? A. No.

Q. Your apartment? A. No.

Q. Somebody else's place? A. Yes.

The Court: Now, counsel, I don't think that is a proper line of inquiry. If you have any record of a conviction for a felony, that is one thing.

Mr. Bradley: Your Honor, I submit it goes to the bias and prejudice of the witness. If he has a motive in working for the Government as an informer, certainly we are entitled to show that as distinguished from his testimony that he went there out of civic duty.

The Court: I have ruled, counsel."

It can be seen from the foregoing that appellant was not precluded from examinng Munson on subsequent arrests, if any, or convictions, if any. The trial court had previously indicated it would indulge inquiries of this nature [R. 25, lines 12-25; R. 26, lines 1-20]. It is therefore apparent that in restricting appellant's cross-examination on this single unrelated arrest that the trial court was exercising a reasonable discretion. Moreover, it was duty bound to do so because "[t]here is a duty to protect [a witness] from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. (*Alford v. United States, op. cit.* at p. 694.) Appellee submits that further delving into the details of the arrest of October 14, 1954, would have been improper because it would have served merely to harass or humiliate the witness.

B. Appellant Has No Cause to Complain Because He Did Not Abide by the Court's Ruling.

Alford v. United States, op. cit., and *District of Columbia v. Clawans,* 300 U. S. 617, 630 (1936), as well as the other cases upon which appellant relies are all distinguishable from the instant case. Those cases all stand for the proposition that cross-examination of the prosecution's witnesses on subjects going to credibilty must not be summarily curtailed. In all of the cases cited by appellant the court ruled *in limine* that the prosecution's witnesses could not be interrogated on certain subjects. However, from the quoted portion of the transcript above, we have seen that appellant's cross-examination was not throttled at the mention of the subject matter. Moreover, here appellant has no cause to complain because, not only was he afforded reasonable scope or latitude in his cross-examination of Munson (*Cf. United States v. Migliorino,* 238 F. 2d 7, 11 (3rd Cir., 1956)), he ignored the court's ruling and pursued the line of inquiry notwithstanding. The record on this point shows [R. 31; R. 32, line 1-7]:

> "Mr. Bradley: Your Honor, I submit it goes to the bias and prejudice of the witness. If he has a motive in working for the Government as an informer, certainly we are entitled to show that as distinguished from his testimony that he went there out of civic duty.
>
> The Court: I have ruled, counsel.
>
> By Mr. Bradley:
>
> Q. Well, as a result of going to work for the Government as an informer, were you promised that you wouldn't be prosecuted on that particular charge? A. No, I wasn't.

Q. Was it discussed at all? A. No, sir. I didn't go to work for the Government until three years ago.

Q. And this particular event occurred four years ago? A. Almost four years ago.

Q. Almost? A. Yes.

Q. On how many occasions have you acted as an informer for the Government? A. Do I have to answer that, sir?

The Court: I think you can answer that.

The Witness: Three or four.

By Mr. Bradley:

Q. Does that include the testimony that you have given here in regard to your connection with Mr. McGowan? A. Yes, it does.

Q. And the performance of those services was in connection with heroin? A. Yes, sir."

Appellant then abandoned the subject and went on to other matters.

The government submits that the instant situation is well within the case of *Chevillard v. United States,* 155 F. 2d 929, 930 (9th Cir., 1946). There, the court affirmed the trial court's ruling that one B——, a government witness who had pleaded guilty to the crime with which Chevillard was charged need not answer the question "do you know how long you could be sent to jail." This court there held that the trial court did not abuse its discretion in limiting this cross-examination of B——. In *Chevillard* the witness' hopes for leniency at time of sentence, it would seem, could not fail to affect his testimony. Yet here Munson was not a co-defendant or co-conspirator of ap-

pellant. However, in the instant case, the possibility of Munson's bias or hope of leniency were thoroughly explored by appellant, *supra.*

Conclusion.

In conclusion, appellee usbmits to this Honorable Court:

1. That the trial court did not abuse its discretion when it reasonably limited appellant's cross-examination of the government's witness when it appeared that the questions were designed to humiliate or annoy him rather than to test his credibility, and
2. That in any event appellant has no cause to complain since he continued to probe the subject despite the court's ruling.

Hence, for either or both these reasons, the judgment appealed from below should be affirmed.

Respectfully submitted,

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